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CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS:

MISCELLANEOUS

NO. 79-824

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1979

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA, ET AL.,
PETITIONERS

V.

WNCN LISTENERS GUILD, ET AL.

On Petitions For
Writ Of Certiorari To The United States
Court Of Appeals
For The District Of Columbia Circuit

OPPOSITION OF OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHIRST, ET AL. TO PETITIONS FOR A WRIT OF CERTIORARI

The Office of Communication of the United Church of Christ, the Mexican American Legal Defense and Educational Fund, the National Latino Media Coalition, the National Council of La Raza, the Bilingual Bicultural Coalition on Mass Media, the

American G.I. Forum, and Public Communications, Inc., [1] hereby jointly oppose the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review that court's judgment, entered June 29, 1979, in WNCN Listeners Guild v. Federal Communications Commission, Nos. 76-1692, 76-1793 and 77-1951. We understand that WNCN Listeners Guild, petitioner in No. 76-1692, and Classical Radio for Connecticut and Committee for Community Access, petitioners in No. 76-1793, are also opposing the grant of a writ of certiorari.

1/ The Office of Communication, a national instrumentality of the United Church of Christ, conducts a ministry in the mass communication media which includes among its concerns the protection of the right of racial and other minorities to broadcast service and the public's right to receive diverse programming from the media. The other respondents are non-profit organizations which have among their concerns the provision of broadcast service to Spanish-speaking persons and other persons with distinct cultural heritages. Respondents, hereinafter referred to as "UCC et al", were petitioners in No. 77-1951.

OPINIONS BELOW

The opinions below are set forth in the Petition filed by the Federal Communications Commission and the United States of America.[2]

JURISDICTION

The jurisdictional requisites are adequately set forth in the Government's Petition.

QUESTION PRESENTED

Whether the Communications Act of 1934, read in light of First Amendment goals, includes a concern for diversity of programming so that the potential loss of a unique, financially viable format desired by a significant segment of the listening public is one of the factors bearing on the public interest which the Federal Communications Commission must consider when a radio broadcast license is renewed or transferred?

2/ References to the court of appeals' opinion will be cited herein to the material appended to the Government's petition as "FCC App. ___."

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The case involves the First Amendment to the United States Constitution and Sections 3(h), 303(g), 309(a), 310(d), 326 and 402(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§153(h), 303(g), 309(a), 310(d), 326, and 402(b). These constitutional and statutory provisions are set forth in the Appendices to this Opposition.

STATEMENT OF THE CASE

As the court of appeals noted, this case essentially arises from ". . . the common and undivided ownership of the airwaves by all of the people . . ." FCC App. 37a. Thus, while the case is set in the procedural context of review of a Commission Policy Statement (FCC App. 117a, et seq.), it in fact presents the narrow and undisputed premise that diversity is one of the statutory goals of the Communications Act. Acting on this premise, the court of appeals has consistently held, over the repeated opposition of the Commission, that there is a public interest in diversity of entertainment formats. Therefore, the court has held the loss of a unique, financially viable format that serves as a first preference to a significant segment of the public obligates the Commission to consider the public's stated needs and interests in executing its affirmative obligation to find that each renewal or transfer of a broadcast license is in the "public interest, convenience and necessity".

Since the inception of broadcast regulation it has been understood that, while Congress determined to keep the business of broadcasting in the private sector, ownership was to remain with the American people. The Communications Act of 1934 and the Radio Act of 1927 directed the Commission to grant and renew licenses only if the public interest, convenience and necessity will be served thereby. In giving concrete meaning to the public interest standard, both the Federal Communications Commission and its predecessor, the Federal Radio Commission, acted on the assumption that program service was at the heart of the public trusteeship concept and, therefore, a prime factor to be taken into

consideration in its licensing function.[3] Central to this analysis was an evaluation of the extent to which the diverse needs, interests, and problems of the community of license were being met by broadcasters. As early as 1928, the Federal Radio Commission, in a formal statement of principles interpreting the public interest clause of the Radio Act of 1927, stated:

> . . . The Commission is convinced that the interest of the broadcast listener is of superior importance to that of the broadcaster . . .
>
> The Commission also believes that the public interest, convenience, or necessity will be best served by avoiding too much duplication of programs and types of programs . . . Where one type of service is being rendered by several stations in the same region, consideration should be given to a station which renders a type of service which is not such a duplication.
>
> In view of the paucity of channels, the Commission is of the opinion that the limited facilities for broadcasting should not be shared with stations which give the sort of service which is readily available to the public in another form.[4]

3/ See Report on Public Service Responsibility of Broadcast Licenses (1946) and Report re En Banc Programming Inquiry, 44 F.C.C. 2303 (1960).

The following year, the Federal Radio Commission enlarged on what it called a "principle of nondiscrimination" as a basic formula for evaluating the public interest performance of broadcasting stations: ". . .[T]he entire listening public within the service area of a station, or of a group of stations in one community, is entitled to service from that station or stations."[5] Although the Commission recognized that this did not mean that each person was entitled to his exact programming preference, it did mean that ". . . the tastes, needs, and desires of all substantial groups among the listening public should be met, in some fair proportion, by a well-rounded program."[6]

4/ Federal Radio Commission Annual Report, 166, 167-168 (1928) (hereinafter "FRC Ann. Rep.")

5/ The Great Lakes Statement, 3 FRC Ann. Rep., 32 (1929).

6/ Ibid. The Commission's description of such a program included ". . . entertainment

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The Federal Communications Commission continued to emphasize its predecessor's requirement that broadcast licensees, in order to fulfill their statutory obligations, must present, either individually or jointly, programming sufficiently diverse and balanced to meet the tastes, needs, and desires of the significant segments of the community of license. This emphasis was the underlying premise of all subsequent Commission pronouncements on programming policy up until the Commission's Policy Statement on entertainment formats, vacated by the court of appeals.7/

6/ (cont. from previous page)

consisting of music of both classical and lighter grades, religion, education and instruction, important public events, discussions of public questions, weather, market reports and news, and matters of interest to all members of the family . . ." Ibid.

7/ See First Report of the Federal Communications Commission to Congress Pursuant to Sec. 307(c) of the Communications Act of 1934 (1935); Report on Public Service Responsibility of Broadcast Licensees, at 10, 13, 58 (1946); Report re En Banc Programming Inquiry, 44 F.C.C. 2303, 2316 (1960); Primer on Ascertainment of Community Problems by Broadcast Renewal Applicants, 57 F.C.C. 2d 418 (1976); Ascertainment of Community Problems by Non-Commercial Educational Broadcast Applicants, 58 F.C.C. 2d 526 (1976).

The FCC's abrupt change and denial of any concern with radio formats can only be fathomed in light of the changes in the nature of formats that the radio industry undertook in the 1960's in response to advertisers' switch to television:

> Faced with declining revenues and declining audiences radio was forced to find and adopt new methods . . . [A]nother change in radio formats began to be instituted, "vertical programming." As long as competing radio stations were playing essentially the same music and appealing to the same audience, there was little to distinguish one station from another -- little reason for advertisers to choose among stations. . . .[S]tations found that they could appeal to a particular identifiable audience and consequently that advertisers would know who would be reached by advertising messages. "Vertical programming" is simply the broadcasting of one type of music, or news, to appeal to a particular audience segment.
>
> With the adoption of vertical programming came the end of the radio station that broadcast a range of offerings to have wide appeal. . . Many observers believe that this loss of the broadly programmed stations greatly diminished the importance of radio and its ability

> to serve the public interest. The problem was that radio was caught in the explosion of television and no one thought much about radio's contribution to the public interest in the excitement of the time. . . . Each station tries to win a loyal following and advertisers know who is being reached.8/

Thus, what was novel at the commencement of the 1970's was not the concept that the FCC should be concerned with the nature of entertainment programming presented by licensees, for the Commission had repeatedly emphasized the public interest considerations therein in the context of its interpretation of "well-balanced responsive programming." Similarly, the public's need for that sort of programming had not been altered. What was novel was the overwhelming departure of broadcasters from the well-balanced format to the specialized format in order to capture advertising dollars.

8/ L. Morrisett, Radio - USA, 6 (Reprinted from the 1975/76 Annual Report of The John and Mary R. Markel Foundation, 50 Rockefeller Plaza, New York, New York).

The regulatory implications of this economically inspired change were examined by the Court of Appeals for the District of Columbia Circuit in a series of cases9/ culminating in an en banc decision in Citizens Committee To Save WEFM v. FCC, 165 U.S. App. D.C. 185, 506 F.2d 246 (1974) (hereinafter "WEFM"). These cases were brought by listeners' groups challenging Commission approval of assignment and transfer applications which involved substantial changes in program formats. In WEFM, the Court reviewed its prior decisions which applied the Communications Act's public interest mandates (Sections 309(a) and 310(d)), and the Commission's statutory obligation under Section 303(a) to "encourage the larger and more effective use of

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9/ Citizens Committee to Preserve the Voice of Arts in Atlanta v. FCC, 141 U.S. App. D.C. 109, 436 F.2d 263 (1970); Hartford Communications Commission v. FCC, 151 U.S. App. D.C. 354, 467 F.2d 408 (1972); Lakewood Broadcasting Service, Inc., v. FCC, 156 U.S. App. D.C. 9, 478 F.2d 919 (1973); Citizens Committee to Keep Progressive Rock v. FCC, 156 U.S. App. D.C. 16, 478 F.2d 926 (1973). The timing of these cases is directly linked to the decision in Office of Communication of

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radio", "by its terms and as read by the Supreme Court."[10/] The WEFM Court reaffirmed that ". . . there is a public interest in diversity of broadcast entertainments."[11/] It noted that ". . . most format changes . . . do not diminish the diversity available, and 'are thus left to the give and take of each market environment and the business judgement of the licensee.'"[12/] Where the format proposed to be abandoned was allegedly unique, financially viable, and there was significant public outcry, its loss would affect diversity and the Commission must consider this

9/ (cont. from previous page)

the United Church of Christ v. FCC, 123 U.S. App. D.C. 328, 359 F.2d 944, 1005 (1966), which reversed the Commission's position that listeners and viewers did not have standing to bring challenges in Commission licensing proceedings.

10/ WEFM, at 368, 34.

11/ WEFM, at 261.

12/ Id., at 261, quoting Citizens Committee to Preserve Voice of Arts in Atlanta v. FCC, 141 U.S. App. D.C. 109, 436 F.2d 263 (1970).

factor, along with other public interest factors, in reaching its public interest determination. If there were substantial questions of fact, inadequate data, or unresolved public interest issues, the Commission was obligated to hold a hearing pursuant to §§309(a), (d), (e) and 310(d) of the Act.

THE COMMISSION PROCEEDING

On January 19, 1976, the Commission issued a Notice of Inquiry (FCC App. 60a, et seq.) to consider "its policies and practices with respect to changes in the entertainment formats of broadcast stations." [13/] FCC App. 60a. The Notice restated the "Additional Views of Chairman Burch" (FCC App. 61a-62a), which had been considered and rejected by the Court in WEFM, in the course of posing the questions

13/ The Commission did not reach this conclusion without first considering further court review of the WEFM opinion. A review of documents obtained from the Commission in response to a Freedom of Information Act Request filed by Citizens Communications Center revealed that the Commission went to the extent of preparing a draft petition to this Court for Writ of Certiorari. Letter from Wallace A. Johnson, Chief, Broadcast Bureau to Charles M. Firestone, re: FOIA Request 20682. Apparently, at that time, the Com-

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which were to be the subject of the inquiry: whether the public interest standard requires close scrutiny of format changes to assure appropriate diversity and whether the First Amendment permits such a judgment? FCC App. 65a.[14/] The Commission's view was that format regulation may not be something that "can realistically be achieved"; would require "pervasive governmental regulation" with "adverse consequences for the public interest" (FCC App. 65a); that "the search for the public interest in entertainment formats may be a difficult and ultimately futile exercise" (FCC App. 66a); and that selective review of proposed format changes was an administrative "guagmire" to be avoided in "the absence of a compelling public interest need." FCC App. 67a.

13/ (cont. from previous page)
mission did not think it had the requisite record for a successful endeavor.

14/ For those who favored strict compliance with the Act's public interest mandate, the Commission propounded a series of questions seeking views on when the Commission should become involved; whether there should be format categories; what "burdens" should be placed on demonstrating uniqueness; what
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In a concurring statement, former Commissioner Benjamin L. Hooks recognized that, despite the difficulties, "the final responsibility of assuring service to all segments of the community may ineluctably abide" with the Commission. FCC App. 79a.

> . . . [T]he issue here settles neither on free speech nor on a free market. The issue is whether the right of minority audiences are subordinate to the entrepreneurial quest for profit maximization. We are not naive enough to suppose that formats are changed for any altruistic purpose.
>
> Chillingly boundless are the number of hypothetical extremes to which the court's doctrine could be taken if extrapolated to logical absurdities.

14/ (Cont. from previous page)
format; if a format is unique, what consideration should be given to similarity, population, other areas served, audience, and hours of operation; how the burden of proof should be allocated; when a proposal should require a hearing; when a change in format should be considered (e.g., at renewal, assignment, etc.); and whether maximization of program diversity is necessarily in the public interest. FCC App. 70a-71a.

> However, I believe a common sense interpretation of the judicial is preferable . . . [O]ur energies would be best spent, I believe, in devising tenable standards to apply rather than battling speculative aberrations. FCC App. 81a-82a [footnote omitted].

On July 30, 1976, the Commission issued its Memorandum Opinion and Order, 60 F.C.C. 2d 858 (1976) (hereinafter "Policy Statement"). FCC App. 117a, et seq. The only substantive addition distinguishing the Policy Statement from the previously repudiated "Addition Views of Chairman Burch" and the Notice of Inquiry[15/] was a staff study (the existence of which was kept from the public) which the Commission believed to be supported by the "Owen Study". The latter had been commissioned by the industry trade

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15/ While in the Notice of Inquiry, the Commission had sought the views of others, it did not, in fact, rely on the filings for its conclusion. Instead, in Appendix A to the Policy Statement (FCC App. 135a), it provided a "Summary of Comments" in which it selectively undertook a look at the citizen and public interest comments and the comments of broadcasters. Significantly, it avoided all discussion of comments which were responsive to how administrative and First Amendment entanglements, if any, could be avoided or minimized.

organization. These studies, the Commission found demonstrated that while the ". . . market for radio advertisers is not a completely factual mirror of the listening preferences of the public at large . . ." (FCC App. 128a), marketplace forces were ". . . the best available means for producing the diversity to which the public is entitled . . .". FCC App. 128. These findings led the Commission to renounce its former commitment to ". . . take an extra hard look at the reasonableness of any proposal that would deprive a community of its only source of a particular type of programming . . .". FCC App. 134a. Instead, the Commission arrived at the historically startling conclusion ". . . that such a position is neither administratively tenable nor necessary in the public interest." FCC App. 134a, n.8. It was on this basic position that Commissioner Hooks dissented from the Policy Statement because:

> . . . Without suggesting an alternative response to minority format abandonment, the majority does not provide a mechanism to ensure service to significant minority tastes and needs if market forces do not. In this Republic, the role of regulation of commerce has been to offset and remedy errant or inefficient market forces. The Commis-

sion's role in the commercial regulatory structure is well defined. FCC App. 171a [footnote omitted].

All Petitions for Reconsideration were denied by the Commission. Memorandum Opinion and Order, 66 F.C.C. 2d 78 (1977) (FCC App. 176a).[16/]

THE COURT OF APPEALS DECISION

The Petitioners in this Court seek review of an en banc decision of the court of appeals holding that " . . . the Communications Act's public interest, convenience, and necessity standard includes a concern for di-

16/ UCC et al filed one of the petitions for reconsideration denied by the Commission, noting that while most Hispanic-Americans were bilingual, many Hispanics regarded Spanish as their primary language and the small amount of Spanish programming presently available might be the only broadcast service directed to the needs of the Latino or Mexican-American community. Particularly, in the area of foreign language programming, the entertainment format may be the only viable broadcast vehicle for informational and public affairs programming. Pointing to census figures that indicated that Hispanic-Americans are economically disadvantaged, the petition noted the grave risk that Spanish programming might not always command the greatest advertiser support because Spanish-speaking persons generally have little purchasing power and may thus be less attractive to advertisers.

verse entertainment programming . . .".[17/] FCC App. 4a-5a. That decision vacated the Commission's 1976 Policy Statement which held that under no circumstances was the Commission statutorily obligated to consider in a licensing proceeding the public interest implications of the loss of service to a substantial segment of the listening public occasioned by the abandonment of a unique, financially viable format.

The court noted that ". . . Congress set aside the radio spectrum as a public resource and acted to secure its benefits, not only to those in the cultural mainstream, but to 'all the people'."[18/] It concluded that the Commission ". . . must sometimes consider the loss of diversity (together with other factors bearing on the public interest) when deciding assignment applications involving abandonment of existing formats . . ." (FCC App. 5a) in making its statutorily man-

17/ Communications Act of 1934 §§309(a), 301(b), 47 U.S.C. §§309(a), 310(d).

18/ Quoting National Broadcasting Co. v. United States, 319 U.S. 190, 216-17 (1943) [emphasis by the court of appeals].

dated public interest determination.[19]

Because the court's decision was dictated by a statutory and constitutional interpretation clearly and irreconcilably at odds with that of the Commission (FCC App. 4a-5a, 32a-33a), the court declined to adopt the fruitless procedure of merely remanding the proceeding to the agency so that certain crucial procedural errors inherent in the Policy Statement could be corrected. Nevertheless, the court was greatly troubled by the Commission's procedural unfairness (FCC App. 14a-17a)[20], and the Commission's "sometimes drastic misreading" of the prior format

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19/ The Court noted, however, that the public interest implications of format abandonment need not be considered when the loss in diversity is not serious or the assignment clearly satisfies other public interest considerations. FCC App. 5a-6a.

20/ However, Judge Bazelon believed that the Commission's failure to make public a staff study which was central to its decision and its "almost cavalier disregard for the public's right to comment on the critical data and methodology" "violate[d] fundamental rulemaking principles" and required vacating the Policy Statement. FCC App. 41a. On this ground he concurred in the majority's decision.

cases. FCC App. 23a.

The court took great pains to explore the limited holding of its format decisions. It noted its repeated emphasis that " . . . WEFM was not intended as an alternative to format allocation by market forces . . ." (FCC App. 24a [emphasis in original]), but rather, recognized, as did the Commission, that the " . . . radio market is an imperfect reflection of listener preferences." FCC App. 24. Thus, " . . . [t]he Commission's obligation to consider format issues arises only when there is strong prima facie evidence that the market has in fact broken down . . ." FCC App. 24a.

In reviewing the Commission's "administrative nightmare" argument, the court noted that only one format case had resulted in a hearing (FCC App. 19a); that counsel for the Commission conceded that the " . . . 'administrative nightmare' characterization was an 'exaggeration' and not 'very significant at all' . . ." to the Commission's decision (FCC App. 20a); and that " . . . any system of pervasive regulation of the type envisaged by the Commission would indeed be an administrative nightmare . . .". FCC App. 24a [emphasis

added]. Similarly, the court examined the Commission's contention that WEFM would have an unconstitutionally chilling and intrusive effect on licensee programming, noting that the Commission provided no evidence to sustain that contention and that its staff report concluded that " . . . under the WEFM regime licenssees have been aggressive in developing diverse entertainment formats." FCC App. 25a.

Finally, the Court emphasized that it could not dictate "what, if any, standards the Commission should adopt" (FCC App. 28a), for only the Commission had the power " . . . to determine how to perform its regulatory function within the substantive and procedural bounds of applicable law." FCC App. 27a. The court further emphasized " . . . the Commission's discretion to develop administrative standards, and stressed that judicial review thereof will be limited and deferential . . .". FCC App. 28a [footnotes omitted].

REASONS FOR DENYING THE WRIT

I. REVIEW SHOULD BE DENIED BECAUSE THE COURT OF APPEALS CORRECTLY DECIDED THE STATUTORY QUESTIONS AND THERE IS NO POSSIBILITY OF CONFLICT IN DECISIONS.

A. The Court Of Appeals, Consistent With The Communications Act And This Court's Decisions, Correctly Decided That There Is A Public Interest In Diverse Entertainment Programming And That The Commission Cannot Abdicate Its Statutorily Imposed Obligation To Make Affirmative Public Interest Determinations.

The court of appeals held that the public interest, convenience and necessity standard of the Communications Act includes a concern for diverse entertainment programming. FCC App. 4a-5a. Petitioners attempt to characterize the court's holding as a policy determination, rather than a statutory interpretation, because the court relied on the "general" statutory language of the Act's public interest mandate. However, the court of appeals' interpretation of the statute is fully consistent with, and indeed compelled by, this Court's interpretation of the Act's public interst standard, in addition to other statutory provisions. It is the Commission's rejection of those statutory obligations which is inconsistent with teachings of this Court.

The initial decisions of this Court review-

ing the agency's regulatory role clearly established that the standard governing the exercise of the Commission's licensing power was the Act's public interest clauses. Early on, this Court rejected the contention that the general language of these clauses compelled a restrictive interpretation of the Commission's regulatory responsibilities and authority.

> The Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication . . . [The Act] does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. 21/

The congressional touchstone was the public interest standard, a criterion which " . . . is as concrete as the complicated factors for judgment in such a field of delegated authority permit."22/ The public interest to be served has

21/ National Broadcasting Company v. United States, 319 U.S. 190, 215-216 (1943).

22/ Ibid., quoting Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134 138, (1940).

been defined consistently in terms of service to the listening public and its interest in "the larger and more effective use of radio."23/ An important element of the licensing evaluation is ". . . the ability of the licensee to render the best practical service to the community reached by his broadcasts."24/ Reading the various provisions of the Act, this Court concluded that the ". . . aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States",25/ and to achieve this end, the Commission was given a "comprehensive mandate." 26/ In Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367, 390 (1968) (hereinafter "Red Lion"), this Court affirmed the ". . . right of the public to receive suitable

23/ Ibid., citing Section 303(g) of the Act, 47 U.S.C. §303(g).

24/ Federal Communications Commission v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940) (hereinafter "Sanders Bros.").

25/ National Broadcasting Company, 319 U.S., at 217.

26/ Id., at 219.

access to social, political, esthetic, moral, and other ideas and experiences . . ." In its format holdings, the court of appeals relied on such cases interpreting the provisions of the Communications Act in holding that there is a public interest in diversity of entertainment formats.

Petitioners cite neither statutory authority nor decisions of this Court which suggest the contrary. Rather, petitioners seem to suggest that the public interest standard is a statutory stepchild. Significantly, the Commission concedes that there is a "statutory objective of program diversity". FCC Pet., at 19, n.14. See also Id. at 7, 16. The Commission's argument is that once it determined that marketplace forces do work to produce diversity most of the time, it was relieved of any statutory obligation to make a public interest determination, even when there was evidence or questions of marketplace failure depriving a significant segment of the public of desired broadcast service. FCC App. 128a, 138a, n.8.

The court of appeals simply held that the Commission could not abdicate to the marketplace its statutory responsibility to make an affirma-

tive public interest determination.[27/] Where a significant segment of the public complains about a loss of service, that community outcry becomes a public interest issue which the Commission must consider pursuant to Sections 309 and 310. If substantial and material questions of fact are presented, or the Commission is for any reason unable to make an affirmative public interest finding, then, pursuant to Section 309(e) of the Act, it must hold a hearing. The court of appeals did not presume to tell the Commission what weight should be accorded the loss of diversity factor in balancing the various other public interest criteria. It acted only to "assure itself that the Commission [would give] reasoned consideration to each of the pertinent factors."[28/] See also Citizens Communications Center v. FCC, 145 U.S. App. D.C. 32, 447 F.2d 1201 (1971).

27/ Federal Communications Commission v. RCA Communications Inc., 346 U.S. 86, 93-94, 97, (1953); National Broadcasting Co. v. United States 319 U.S., at 215-216; Sanders Bros., 309 U.S. at 476; Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S., at 137.

28/ Permian Basin Area Rate Cases, 390 U.S. 747, 792 (1968).

B. The Court Of Appeals Correctly Determined That The Legislative History Of The Act Did Not Prohibit Commission Consideration Of Loss Of Service To A Significant Segment Of The Listening Public As Part Of The Statutorily Mandated Public Interest Determination.

The industry petitioners contend that various remarks made in the course of enacting the Radio Act of 1927 and the Communications Act of 1934 confirm that Congress deliberately denied the Commission the power to consider such elements of service as entertainment programming. See ABC Pet., at 14-15; INSILCO Pet., at 20-21; NAB Pet., at 15-16 n.19. The argument is overdrawn in all the petitions. At the time of passage of the Act, and in the years preceding, there were various legislative attempts to allocate broadcast facilities to various special uses -- educational, religious, agricultural, labor, cooperative -- first, under the so called Hess bill, and later under the Wagner-Hatfield bill. Neither attempt was successful. Instead, the FCC was directed by Congress to hold hearings on the reserved channel concept and report back to Congress. The notion of reserved channels was clearly not renounced by Congress. All of the petitions before the Court contain parts

of the debate.[29/]

It is not surprising that the Commission does not here advance the industry's view of this question. The Commission historically has had a different opinion of the scope of its authority, and has read the legislative history (selectively relied on by the other petitioners) to reach a contrary interpretation of its mandate -- an interpretation fully substantiated by that legislative history. Thus, in its Report on the Public Service Responsibility of Broadcast Licensees (1946) ("The Blue Book"), the Commission stated:

> In the course of the discussion of the 1934 Act, an amendment to the Senate bill was introduced which required the Commission to allocate 25 percent of all broadcasting facilities for the use of educational, religious, agricultural, labor, cooperative and similar non-profit-making organizations. Senator Dill, who was the sponsor in the Senate of both the 1927 and 1934 Acts, spoke against the amendment,

29/ A full description of this history is provided in E. Barnouw, The Golden Webb, A History of Broadcasting in the United States Volume II-1933 to 1953, 22-28 (1968). See also Id., at 293-295 for discussion of the Commission's action in reserving educational television channels without seeking additional legislative authority.

stating that the Commission already had the power to reach the desired ends (78 Cong. Rec. 8843):

> "The difficulty probably is in the failure of the present Commission to take the steps it ought to take to see to it that a larger use is made of radio facilities for educational and religious purposes.
>
> * * * * * *
>
> "I may say, however, that the owners of large radio stations now operating have suggested to me that it might be well to provide in the license that a certain percentage of the time of a radio station shall be allotted to religious, educational, or non-profit users."

Senator Hatfield, a sponsor of the amendment,

> "I have no criticism to make of the personnel of the Radio Commission, except that their refusal literally to carry out the law of the land warrants the Congress of the United States writing into legislation the desire of Congress that educational institutions be given a specified portion of the radio facilities of our country." [Emphasis by the Commission].

The amendment was defeated and Section 307(c) of the Act was substituted

> which required the Commission to study the question and to report to Congress its recommendations.

In its Report to Congress, the Commission represented that the " . . . present legislation has the flexibility essential to attain the desired ends without necessitating at this time any changes in the law. There is no need for a change in the existing law to accomplish the helpful purposes of the proposal."30/

C. The Court Of Appeals' Decision Does Not Conflict With Section 3(h) Of the Communications Act.

Section 3(h) of the Communications Act, 47 U.S.C. §153(h), provides that " . . . a person engaged in radio broadcasting shall not . . . be deemed a common carrier." The Commission asserts that the lower court's interpretation of the agency's mandate to make a public interest determination as to format changes pursuant to Sections 393(g), 309 and 310 of the Act transgresses Section 3(h)'s prohibition against imposing common carrier obligations upon broadcasters. FCC Pet., at 13, 17. See also ABC Pet., at 13, 16-17; NAB Pet., 15 n.18. In an

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30/ First Report of the Federal Communications Commission to Congress Pursuant to Sec. 307(c) of the Communications Act of 1934 (1935).

effort to create a controversy of sufficient gravity to warrant this Court's review, the Commission has proposed a construction of Section 3(h) far beyond anything this Court has previously suggested.

This Court recently addressed the scope of Section 3(h) in Federal Communications Commission v. Midwest Video Corp., 440 U.S. 689 (1979) (hereinafter "Midwest Video"). There, relying upon CBS v. DNC, the Court stated that:

> . . . [Section] 3(h) embodies a substantive determination not to abrogate a broadcaster's journalistic independence for the purpose of, and as a result of, furnishing members of the public with media access . . .
>
> * * * * * * *
>
> . . . the purpose of the provision and its mandate wording precludes Commission discretion to compel broadcasters to act as common carriers, even with respect to a portion of their total services. Midwest Video, 440 U.S., at 706, n.15 [emphasis added].

Nothing in the court of appeals' construction of Sections 303(g), 309 and 210 conflicts with the foregoing. The requirement that the Commission make a public interest determination regarding the proposed abandonment of a unique, financially viable format, in the face of a numerically

significant public outcry from responsible members of the community, does not result in " . . . furnishing members of the public with media access . . .". Midwest Video, at 706, n.15.[31/] All that would conceivably be required is that if, in the final analysis, the proposed format switch under consideration would be clearly detrimental to the public interest, the Commission would, in the exercise of its discretion, have to fashion an appropriate remedy. The court of appeals, consistent with this Court's rulings in Federal Communications Commission v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978) (hereinafter "NCCB"), and Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978) (hereinafter "Vermont Yankee") studiously avoided dictating to the the Commission the nature or scope of such a remedy. See e.g., FCC App. 27a-32a.

31/ To function as a common carrier, a broadcaster would have to be compelled to make a " . . . public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing . . .". Midwest Video at 701.

The decision below is also consistent with Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973) (hereinafter "CBS v. DNC"), and Sanders Bros. The latter case held that " . . . economic injury to a rival station is not, in and of itself, and apart from considerations of public interest, convenience, or necessity, an element the [Commission] must weigh . . . in passing on an application for a broadcasting license." Sanders Bros., 309 U.S. at 473. This is in "contradistinction" to the Commission's obligations under the common carrier provisions of the Act. Id., at 474. [B]roadcasters are not common carriers and are not to be dealt with as such . . .". Ibid. [footnote omitted]. "Plainly it is not the purpose of the Act to protect a licensee against competition [from a fellow broadcaster] but to protect the public . . .". Id., at 475.

CBS v. DNC held that " . . . Congress pointedly refrained from divesting broadcasting of their control over the selection of voices [to be broadcast over their licensed frequency]; §3(h) of the Act stands as a firm congressional statement that broadcast licensees are not to be treated as common carriers, obliged to accept whatever is tendered by members of the public . . .". CBS v. DNC, at 116. See also Midwest Video, 440 U.S., at 706, n.15.

this Court prefaced that pronouncement by emphasizing that " . . . it is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not be constitutionally abridged either by Congress or by the FCC. Red Lion, supra, at 390." CBS v. DNC, at 102. Just as clearly, that right may not be rendered illusory by the artificial and overbroad construction of Section 3(h) proposed by the Commission.

Nothing in Midwest Video, CBS v. DNC or Sanders Bros. even suggests the interpretation of Section 3(h) advanced by the Commission. To insure that the abandonment of a unique, financially viable format, in the face of significant, responsible public outcry, is not injurious to the public interest does no violence to this Court's prior rulings. It would be extreme redundancy for this Court to have to again reaffirm the basic notion underlying the Communications Act that a licensee's programming discretion ends where the public's First Amendment rights are injured by an exercise of that discretion. CBS v. DNC; Red Lion.

D. The Court Of Appeals' Decision Does Not Conflict With Section 326 Of The Communications Act.

Section 326 of the Communications Act, 47 U.S.C. §326, prohibits the Commission from exercising any "power of censorship" or other interferences "with the right of free speech" over the public airwaves. Insofar as that provision restates basic First Amendment concerns specifically as to broadcasting, the consistency of the lower court's decision with those concerns is addressed infra, at 39-45. To the extend that Section 326 stands independently, this Court's recent decision in Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726 (1978) (hereinafter "Pacifica"), defeats the petitioners claim that the decision below conflicts with Section 326. See e.g., FCC Pet., at 18; ABC Pet. at 15; NAB Pet., at 20, 22; INSILCO Pet., at 21.

In Pacifica, this Court approved the Commission's censure of a license who had broadcast an "indecent" program segment in violation of 18 U.S.C. §1464. In validating this governmental intrusion into what, in a non-broadcasting context, would have been considered protected speech, Pacifica, at 748-751, the Court held that:

> [t]he prohibition against censorship unequivocally denies the Commission any power to edit proposed broadcasts in advance and to excise material considered inappropriate . . . Id., at 735 [emphasis added].

Here, the court below has not ordered the Commission to either "edit", "exise" or otherwise determine whether a licensee's proposed programming is "inappropriate for the airwaves" Ibid. Rather, it was held that when called upon by a significant, responsible segment of the public, the Commission must determine whether the mandate of Sections 303(g), 309 and 310 will be met by the abandonment of a unique, financially viable format. Neither censorship, prior restraint nor the Commission's subjective programming preferences enter into the question. The Commission's basic administrative discretion to resolve the issue in the least restrictive manner possible, consistent with the public interest, has not been altered. See FCC App. 27a-32a. This is consistent with NCCB and Vermon Yankee. Only by the Commission's affirmative exercise of its obligation to make a public interest determination can a licensee's discretion under the Act, to select his own programming within the parameters of the public interest, be

constitutionally squared.[32/] Pacifica, at 748; CBS v. DNC, at 110, 117. There is no incompatability between the decision below and Section 32

32/ The Commission has, in the past, never been troubled by imposing what might otherwise be characterized as prior restraints on licensees by approving or rejecting not merely general formats (unique or otherwise) but individual programs. See e.g., Prime Time Access Rule, 47 F.C.C. 2d 769 (1973) (a waiver of the Prime Time Access Rule was granted to permit the broadcast of National Geographic programs, because they were of distinctive character); 43 F.C.C. 2d 269 (1973) (approval for the same reason granted for the second time); Prime Time Access Rule, 43 F.C.C. 2d 462 (1973) (a waiver was granted to show reruns of America because of significant public interest in the series); Prime Time Access Rule, 48 F.C.C. 2d 208 (1974) (Hogan's Heroes was denied a waiver because substantial popularity was not a good reason); Prime Time Access Rule, 43 F.C.C. 2d 470 (1973) (the Reasoner Report warranted a waiver); Prime Time Access Rule, 45 F.C.C. 2d 512 (1974) (Animal World warranted a waiver).

See also Ascertainment of Community Problems by Broadcast Applicants, 57 F.C.C. 2d 418 (1976) (where the Commission stated that it would review a renewal applicant's proposed program offering vis-a-vis the stated concerns of the community to determine, in accordance with the public interest standard, whether the licensee's programs would be responsive to community needs and interests). See also Henry v. FCC, 302 F.2d 191 (D.C. Cir. 1962).

II. THE COURT OF APPEALS FULLY CONSIDERED THE RELEVANT CONSTITUTIONAL QUESTIONS PRESENTED AND CORRECTLY CONCLUDED THAT A PUBLIC INTEREST DETERMINATION IN CASES OF CHALLENGED FORMAT CHANGES IS NECESSARY TO REMAIN CONSISTENT WITH FIRST AMENDMENT GOALS.

The Commission claims to be aggrieved by the alleged " . . . failure of the court of appeals to give adequate consideration to the constitutional implications of its holding . . ." FCC Pet., at 23. Consistent with its position below, the Commission does not assert that the statutory requirement set out by the lower court itself transgresses the First Amendment. Rather, the Commission speculates that any serious attempt to implement that mandate will have dire ramifications ultimately inconsistent with the First Amendment.[33/] FCC Pet., 23-25. The industry parties on the other hand, as in the court below, find the basic notion of making a public interest determination re-

33/ That the Commission's "parade of horribles" is speculative cannot be contradicted. It concedes that it was never called upon to implement the statute's mandate prior to the format cases of the 1970's and similarly admits that its efforts in the instant case have been directed solely at avoiding that mandate.

garding any format change constitutionally abhorrent, irrespective of the necessity of such an obligation under the Communications Act. See ABC Pet., at 18-24; NAB Pet., at 20-24; INSILCO Pet., at 17-20. This divergence of opinion between the petitioners—especially considering the regulatory agency's refusal to claim an immediate First Amendment violation inherent in the lower court's analysis—militates against review by this Court at this time.[34/]

The Commission raises the spectre of a "chilling effect" resulting from any effort by it to make a public interest determination in challenged format change cases. It claims that the possibility of even minimal Commission oversight would deter a broadcaster from pursuing new advertising revenues thought to be avail-

34/ Indeed, given the petitioners' strenuous allegation that the court below did not seriously consider the constitutional issues, it is questionable whether this court ought to now assume jurisdiction over this issue. Assuming arguendo, that there is any merit to the petitioners' claims, it would be far more appropriate to review an actual incident of alleged First Amendment violation, rather than the instant speculative assertions.

able to stations with formats other than the one he is currently broadcasting, or, indeed, that he might be deterred from experimenting with a totally new, unique format. FCC Pet., at 23-24. See also ABC Pet., at 23; NAB Pet., at 22.

Further, the Commission asserts that any serious attempt to address this question would result in the Commission making qualitative judgments regarding programming. FCC Pet., at 24. See also ABC Pet., at 21; NAB Pet., at 21-22. This is branded by the industry as "intrusive governmental regulation" (see e.g., ABC, Pet., at 20), resulting, quite possibly, in prior restraint. See, e.g., NAB Pet., at 20. All of these alleged chilling effects, intrusive regulations and prior restraints are claimed to violate this Court's First Amendment teachings set down in CBS v. DNC[35/] and Red Lion.[36/]

As this Court noted in Red Lion, the Commission's statutory obligation to regulate in the public interest is an affirmative one. The Com-

35/ See FCC Pet., at 24; ABC Pet., at 20; NAB Pet., at 21; INSILCO Pet., at 19-20.

36/ See NAB Pet., at 24; INSILCO Pet., at 19-20.

mission must " . . . assure that broadcasters operate in the public interest. . . ." Id., 395 U.S., at 380. See also Id., at 379 (citing 47 U.S.C. §§303, 303(r), 307(a) and 309(a)). The Commission " . . . neither exceed[s] its power under [the Communications Act] nor transgress[es] the First Amendment in interesting itself in general program format and the kinds of program broadcast by licensees. National Broadcasting Co. v. United States, 319 U.S. 190 (1943)." Id., at 395.

This power to "invade" what the petitioners have categorized as a licensee's exclusive First Amendment domain was found to be central to the Act's regulatory scheme and fully compatible with the First Amendment. The Court found it " . . . idle to posit an unabridgeable First Amendment right to broadcast . . . "Red Lion, at 388. " . . .[A]s far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused." Id., at 389.

Thus, the lower court's holding that a statutory public interest determination must be made when a format change is challenged is far from being offensive to the First Amendment. This Court stated that it is " . . . the right of

the viewer and the listeners, not the right of the broadcasters, which is paramount . . ., and that " . . . that right may not be constitutionally abridged either by Congress or by the FCC . . .". Red Lion, at 390.[37/] The instant statutory requirement that the Commission make a public interest finding as to the abandonment of a unique, financiall viable format upon the petitioning of a significant segment of the community is thus constitutionally permissible, if, indeed, not mandated.

This Court's holding in CBS v. DNC is not to the contrary. There, the Court held inter alia, that the public's First Amendment rights in the area of programming addressed to controversial issues of public importance were sufficiently safeguarded by the Fairness Doctrine. Thus, mandatory, paid access to the airwaves by members of the public was not constitutionally compelled.

Reaching that conclusion, in almost total reliance upon Red Lion, the Court noted that

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37/ See also Sanders Bros., 309, at 475; Federal Communications Commission v. Allentown Broadcasting Corp., 349 U.S. 358, 361-362 (1955); 2 Z. Chaffee, Government and Mass Communications, 546 (1947).

Congress had long-ago opted for a regulated rather than a free-market system of broadcasting. CBS v. DNC, 412 U.S., at 110.[38/] The necessary result of that congressional determination was to require that the Commission determine that programming (past and proposed) is in the public interest when passing upon license renewal or transfer applications. This was found to be the basic enforcement mechanism in the regulatory scheme. Id., at 110. Further, this Court noted that the Commission's role as " 'overseer'" and "ultimate arbiter" in those instances where a licensee had abandoned the public interest in favor of his own. This is constitutional quid pro quo of the regulatory scheme where, in the first instance, licensees are afforded programming discretion. Id., at 117. The public's outcry, when its paramount First Amendment rights are being sacrificed by a licensee, is the trigger for that enforcement mechanism. Id., at 110. The Commission cannot

38/ While broadcasters are free--indeed compelled--to compete against one another for advertising revenue, Sanders Bros., they cannot compete in any manner detrimental to the paramount First Amendment rights of the public. Red Lion

shrink from its statutory obligation to insure that the public interest is being served in the face of the public's claim that its interests are being abandoned, "no matter how difficult the task." Id., at 120.[39/] See also Federal Communications Commission v. RCA Communications, Inc., 346 U.S. 86, 93-94, 97 (1953).

The petitioners' claim that the lower court's conclusions are inconsistent with CBS v. DNC is illusory. Rather than relegating the public's paramount First Amendment rights to the unbridled discretion of broadcasters, CBS v. DNC specifically prohibits such a result. The Commission must determine whether the programming decision of broadcasters are in the public interest when significant, responsible segments of the public complain of the proposed abandonment of a unique, financially viable format. This Court's review of such a conclusion is clearly not warranted.

39/ This conclusion is, of course, fully consistent with this Court's decision in Pacifica. See supra, at 36-38.

CONCLUSION

For the foregoing reasons it is respectfully requested that the petition for writ of certiorari be denied.

Respectfully submitted,

Wilhelmina Reuben Cooke
Jeffrey H. Olson

February 6, 1980

Counsel wish to acknowledge the assistance in the preparation of this opposition of Citizens Communications Center legal interns, Kim Comart and Floyd J. Miller.

APPENDIX

APPENDIX A

Relevant portions of the Constitution of the United States are reproduced below:

Amendment I provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for redress of grievances.

APPENDIX B

Relevant portions of the Communications Act of 1934, ch. 652, 48 Stat. 1064, as amended, 47 U.S.C. 151, et seq., are reproduced below:

Section 3(h), 47 U.S.C. 153(h) provides:

"Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

Section 303(g), 47 U.S.C. 303(g), provides:

Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall-

* * * * * * * *

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

Section 309 (a), 47 U.S.C. 309(a) provides:

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

Section 310(d), 47 U.S.C. 310(d), provides:

No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the

proposed transferee or assignee were making application under section 308 for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

Section 326, 47 U.S.C. 326, provides:

Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

Section 402(b), 47 U.S.C. 402(b), provides:

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application

is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this Act whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), and (4) hereof.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this Act.

(8) By any radio operator whose license has been suspended by the Commission.